Supreme Court, U.S.
FILED
AUG 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

October Term 19[illegible]

HORACE BUTLER,

Petitioner,

vs.

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA, T. TRAVIS
MEDLOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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RESPONDENTS' QUESTIONS PRESENTED

I.

Whether his constitutional claim underlying the proceedings are barred from habeas review where the state court determined the same claim was barred from review based upon a procedural default.

II.

Whether the situation presented where a suspect never requested the assistance of counsel during any interrogation, though counsel had met with the suspect prior to the interrogation, is factually distinguishable from Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), and Edwards v. Arizona, 451 U.S. 477 (1981).

III.

Whether Arizona v. Roberson, supra, is to be applied retroactively to cases on federal habeas corpus review at the time the decision was announced?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6677
October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

The Respondents, above named, respectfully submit this Brief of Respondents on Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and would present the following:

CITATION TO OPINIONS BELOW

The opinion of the District Court for the District of South Carolina, Butler v. Aiken, C/A No. 86-1093-3 (D.S.C. June 9, 1987), denying Butler's Petition for a Writ of Habeas Corpus is unreported, and may be found at Joint Appendix (J.A.) pages 91-124. The initial panel opinion of the United States Court of Appeals for the Fourth Circuit, affirming the denial of a Writ of Habeas Corpus, is reported as Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), and is reproduced at J.A. pages 125-133. The Order of the Court of Appeals denying rehearing and rehearing en banc is unreported. Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988). The Order of the United States Court of Appeals for the Fourth Circuit on reconsideration of the Order denying rehearing, and denying rehearing en

banc, concluding that the initial affirmance of the District Court decision was appropriate in substance and denying the Petition for Rehearing and Suggestion for Rehearing En Banc, is reported as Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988), and is reproduced at J.A. pages 134-141.

JURISDICTION

The second Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc was entered December 2, 1988. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

This matter comes before this Court on federal habeas corpus proceedings arising from a 1981 murder conviction in South Carolina that resulted in a sentence of death on the Petitioner, Horace Butler. The trial involved the July 17, 1980, murder of Pamela Lane in Charleston County, South Carolina.

A. The Crime.

Miss Lane, a clerk at a convenience store, was last seen alive when she left her place of employment at around 10:30 p.m., on July 17, 1980. She was riding home alone for the first time on her new moped she received that day. She never arrived home.

Her sister reported her missing the next day. A few hours later, her body

was discovered by fishermen near a bridge. She had been shot once in the chest by a small calibre pistol. The following day a minister found her moped in a pond near his church.

B. The Arrest and Interrogation.

On August 30, 1980, the Petitioner, Horace Butler, was arrested on an unrelated charge of assault and battery and placed in the County Jail. (J.A. pp. 4-5, 44). He received his "Miranda" warnings on that charge. (J.A. p. 5).

According to post conviction testimony, Butler's sister was called by him and asked to call Mr. Hill or have his father go see Mr. Hill (a local attorney). (J.A. p. 66). Hill was contacted and agreed to be retained on the assault charge and appeared with him at the bond hearing held at the jail at approximately 8:30-9:00 p.m., on August 31. (J.A. pp. 65-67). See also (J.A.

p. 38). He was unable to make bond and he was returned to the County Jail. (J.A. pp. 56-57).

At approximately 12:15 a.m., on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed that he was being charged with the murder of Pamela Lane. After receiving the warnings regarding his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) (J.A. pp. 6-19), he stated that he understood his rights and then signed two separate waivers during the interrogation. (J.A. pp. 9-10, 15-16). Sergeant Eugene Frazier meticulously went over the Miranda warnings with the Petitioner. On the issue of whether he understood that he could have a lawyer appointed, Butler initially stated: "Yes sir, Mr. Frazier, but I don't need

no lawyer because I tell you I didn't do no killing." (J.A. p. 7). Sergeant Frazier then further advised him as follows:

> Further, you have a right to have a lawyer here now. In other words, 'if you tell me, Mr. Frazier, yes, I want a lawyer, after I told him he had a right to have one present while we interview him, I says, do you want one now?' And he said, 'Mr. Frazier, I know about the lawyer, but I don't need a lawyer because I didn't did the actual killing ....'

(J.A. p. 7). Butler then gave a verbal statement. Butler then was verbally given the Miranda warnings by Detective Simpson and he signed a written warning form which included the phrase "(3) that I have the right to consult with a lawyer of my choice before I answer any question or give any statement and, also, have him present while I am being questioned; (4) that if I wish to talk to a lawyer or have him present, but am unable to afford or hire a lawyer, one

will be appointed for me free of charge; (5) that if I do decide to answer any question or give a statement without having a lawyer present to represent me, I have the absolute right during this interview to stop answering any questions and remain silent." (J.A. pp. 9-10). Butler then gave a statement admitting knowledge of the murder, but placing the principle blame on Larry White. (J.A. pp. 10-12). This was reduced to writing at 2:55 a.m.

After further discussion about Larry White's statement, Butler then began a third statement after he had been advised of his Miranda warnings again and signed a written waiver form that again listed the warnings. (J.A. pp. 15-16). In this statement, Butler admitted that he had shot Pamela Lane. (J.A. pp. 16-18). After a brief meeting with Larry White, Butler took the police

to the crime scene. (J.A. pp. 22-23). At no time during any interrogation for the Lane murder (or the Kellman assault) did Butler request the presence of any attorney.

Butler offered two explanations of Pamela Lane's death. In his first confession, he claimed that Larry White had killed Lane and sought his help in disposing of the moped. When the police questioned him further, he offered a second confession in which he admitted to killing Lane. According to this statement, he saw Lane riding on her moped and followed her. When he blinked his lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and said she would "cry rape" when she realized she would get home late.

Butler contended that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. (J.A. p. 17). He also claimed Larry White helped him dispose of the moped later. After he signed the second confession at 5:45 a.m., he indicated he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred, and where he dumped the body. (J.A. pp. 20-23). He was returned to jail at about 10:30 a.m., on September 1, 1980.

C. The Trial in January, 1981.

He was subsequently indicted and brought to trial on murder and sentenced to death. The confession was introduced in the guilt phase after a suppression hearing. During the suppression hearing, as well as the state version previously mentioned, the defense

presented Isiah Frazier who testified that he was Butler's principal in elementary school and that Butler was sixteen years old when he left school in the fourth grade. He described Butler as having a less than average intelligence level in the range of 85 to 95. (J.A. p. 43). [The Petitioner presented testimony in the state post conviction relief hearing that Butler had an I.Q. of 69. Joint Appendix in Court of Appeals at 1207, 1222]. Butler testified and denied that his counsel had told him not to talk with the police. (J.A. p. 45). He described the interrogation in markedly different terms than the state witness and claimed Sergeant Frazier scared him and struck him. (J.A. pp. 47-48). Sergeant Shuster was also called who testified that "Mr. Hill had made <u>previous</u> visits to Horace Butler ...." (J.A. p. 55).

Officer John Simpson testified and did not recall any conversation with counsel after the bond hearing that Butler was not to speak with anyone about the assault charge. (J.A. pp. 56-57). He denied seeing Butler getting struck by any police officer or hearing verbal threats against his family. (J.A. pp. 57-58). Particularly, the trial court found that Butler was afforded his Fifth Amendment rights required by Miranda and that the statements were "voluntary, they were made without coercion on the part of the law enforcement officers, without any threat, without any promise, without any inducement to the defendant ... beyond any reasonable doubt." (J.A. pp. 63-64).

D. The Appeal.

Butler's conviction and sentence were upheld on direct appeal on February 22, 1982. State v. Butler, 277 S.C.

452, 290 S.E.2d 4 (1982). There was no issue raised in the direct appeal concerning whether he had properly waived his right to counsel under the Federal Constitution, even though Edwards v. Arizona, 451 U.S. 477 (1981), was decided on May 18, 1981, while the appeal was pending. The only issue raised concerning the confession was based entirely on whether a state law was violated by not providing copies of the statements. (J.A. pp. 70, 72). A Petition for Certiorari was denied on October 12, 1982.

E. The State Post Conviction Relief Proceedings.

In 1983, he unsuccessfully pursued state post conviction relief. (J.A. pp. 68-90). In the state post conviction relief proceeding, the state hearing judge concluded that counsel had performed competently in his preparation

of the hearing to suppress the confessions. (J.A. pp. 84-85). Concerning the admissibility of the confession itself, the state court held that it was procedurally barred under Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), because the court in post conviction relief lacked jurisdiction because it was not a substitute for a direct appeal. (J.A. p. 89).

The Petitioner then filed a Petition for Certiorari from the denial of state post conviction relief to the Supreme Court of South Carolina raising four separate issues, pursuant to Rule 50(9) of Rules of the Supreme Court of South Carolina. He did not raise in the appeal any issue concerning any potential violation of either the Fifth or Sixth Amendment surrounding the admissibility of the confession nor

challenge the hearing court's conclusion that the issue was procedurally barred as a matter of state law. Certiorari was then granted on the sole issue of ineffective assistance of sentencing counsel. State court certiorari was not granted on the remaining three issues concerning the competency of counsel at the guilt phase, the statutory qualifications of counsel, and adequacy of the jury instruction in the penalty phase on the definition of rape. The Supreme Court of South Carolina concluded that the Petitioner received the effective assistance of counsel in the sentencing phase and affirmed the judgment of the hearing court. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986).

This Court held in Harris v. Reed, __U.S.__, 109 S.Ct. 1038, 1043 (1989),

that "an adequate and independent finding of procedural default will bar federal review of the federal claim, unless the petitioner can show "cause" for the default and "prejudice" attributable thereto. The state hearing judge, the only state court rendering a judgment on the issue of the confession clearly stated its judgment rested on a state procedural bar. (J.A. p. 89). The Petitioner has not sought to show "cause" for the failure to raise in the direct appeal which was still pending when Edwards v. Arizona, 451 U.S. 477 (1981), was decided. Here, there was no ambiguity as in Harris v. Reed, supra. The plain statement of the state court was the applicability of a state procedural bar. Federal review of this issue should be barred unless the Murray v. Carrier, 477 U.S. 478 (1986), showing of "cause" and "prejudice" is met.

Remand to the lower court is appropriate. Petitioner is presently represented on the Brief by direct appeal counsel, David I. Bruck, who chose not to pursue the issue on direct appeal and state post conviction counsel, Dale T. Cobb, Jr., who chose to abandon the issue in state court after the hearing judge ruled the matter procedurally barred.

F. The Federal Habeas Corpus Proceedings.

On May 2, 1986, Butler filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. This issue, again, was not raised in original pleadings. Although not amending his original Petition, he included in his Memorandum in Opposition to the State's Motion for Summary Judgment a copy of his Memorandum in Support of his State Post Conviction Relief proceeding that

raised the Fifth and Sixth Amendment issue that the State court held to be procedurally barred. (Joint Appendix to the Fourth Circuit, pp. 1527, 1532). The Federal Magistrate in his Report and Recommendation concluded that his Sixth-Amendment right to counsel had not attached on the murder charge and his Fifth Amendment had been validly waived. Particularly, the Magistrate found "no evidence exists that Petitioner ever attempted to exercise his rights." (Joint Appendix to the Fourth Circuit, pp. 1579-1586).

The United States District Court similarly held that the Fifth Amendment right to counsel was validly waived and that his Sixth Amendment right to counsel had not yet attached to the murder charge since no formal proceedings in the prosecution of that charge had been instituted. (J.A. p.

123). The District Court granted the Respondents' Motion for Summary Judgment on all other grounds. (J.A. pp. 91-124).

The panel decision of the United States Court of Appeals for the Fourth Circuit on May 6, 1988, found that the District Court erred in ruling that the mandate in Edwards v. Arizona, supra, did not apply to the Petitioner's case and concluded that it should be applied to the Petitioner's case. Butler v. Aiken, 846 F.2d 255, 257 (4th Cir. 1988). (J.A. p. 129). The panel held that the confessions were not obtained in violation of the Fifth Amendment. Relating to the particular facts of this case, it stated:

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in Edwards .... We see no reason for a different result simply because the custody was continuous.

> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Id. at 258-259. (J.A. pp. 131-132).

The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 15, 1988. The same day this Court announced its decision in Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988). The Petitioner made a Motion for Reconsideration. On December 2, 1988, the panel considered the Petition for Rehearing and was of the opinion that it should be denied. Further a majority of the active Court voted to deny rehearing en banc, and it

was adjudged and ordered that the Petition for Rehearing and Suggestion for Rehearing En Banc be denied. (J.A. pp. 134-137). In its December 2, 1988, Order, Judge Hall stated:

> As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was arrested conclusively demonstrated invocation of his fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

(J.A. p. 135). The Order stated that Butler may not claim any retroactive benefit from Roberson. Relying upon Allen v. Hardy, 478 U.S. 255, 106 S.Ct.

2878, 2880, 92 L.Ed.2d 199 (1986), the Order stated that Petitioner could not benefit from Roberson.

> The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing 'guidelines to the law enforcement profession.' Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present 'guidelines,' was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

864 F.2d at 25. (J.A. p. 136). This Court granted certiorari on May 1, 1989. (J.A. p. 142).

SUMMARY OF ARGUMENT

The Petitioner's underlying claims under the Fifth and Sixth Amendments should be considered barred because of the state procedural defaults that occurred in the state post conviction proceedings. The state court made a fair statement that it relied on the state procedural bar in dismissing the claim which was not appealed.

Under the facts in this case, the rule of Edwards v. Arizona is inapplicable where the Fifth Amendment right to counsel was not invoked and the Sixth Amendment had not attached to the murder charge. Also, the Petitioner never invoked his right to remain silent or request counsel's presence during any interrogation. Third, counsel was "made available" during the bond hearing in satisfaction of Edwards concerns.

Finally, we submit that Arizona v. Roberson should not be applied to cases final at the time of its decision. It developed new law because it was not dictated from the precedent of Edwards v. Arizona, Maine v. Moulton, and Michigan v. Moseley. It created further a new rule of criminal procedure for law enforcement when dealing with suspects in separate unrelated investigations. Since it does not meet the critical exceptions, the decision should not be given retroactive effect.

ARGUMENT

I.

THE PETITIONER'S FIFTH AND SIXTH AMENDMENT CLAIMS UNDERLYING THE CERTIORARI PROCEEDINGS SHOULD BE CONSIDERED BARRED FROM FEDERAL HABEAS REVIEW BECAUSE OF THE STATE PROCEDURAL DEFAULT FOUND IN THE STATE POST CONVICTION RELIEF PROCEEDINGS.

In the questions presently pending before this Court, the Petitioner raises

the question of whether Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), should be retroactively applied to a murder conviction tried in South Carolina in January, 1981. As a threshold matter, the Respondents' review of the record of the presentation of the underlying Fifth and Sixth Amendment claims reveal that even assuming that applicability of Roberson to a conviction presented in the time frame, federal habeas corpus relief should be barred on the basis of a state procedural default.

In Harris v. Reed, __U.S.__, 109 S.Ct. 1038 (1989), this Court held that while the mere fact that a federal habeas corpus claimant failed to abide by a state procedural rule does not prevent the Supreme Court from reaching the federal claim, where the state court actually relied upon a procedural bar as

a basis for the disposition of the case federal habeas review should be barred.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court held that an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," Murray v. Carrier, 477 U.S. 478, 485 (1986), or demonstrate that failure to consider the federal claim will result in a "fundamental miscarriage of justice." Id. at 495. Engle v. Isaac, 456 U.S. 107, 135 (1982).

This Court has recently held that a habeas petitioner's state procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the

procedural default. Harris v. Reed, supra. See Duggar v. Adams, __U.S.__, 109 S.Ct. 1211 (1989); Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court recently focused on the scope purpose of the writ of habeas corpus:

> "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' Kuhlmann v. Wilson, 477 U.S. 436, 447, 106 S.Ct. 2616, 2623, 91 L.Ed.2d 364 (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause of the default and actual prejudice resulting therefrom. See Wainwright v. Sykes, 433 U.S. at 87-91, 97 S.Ct. at 2506-2509. We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, see Engle v. Isaac,

> 456 U.S. at 129, 102 S.Ct. at 1572, or on the State's interest in the enforcement of its procedural rule, see Murray v. Carrier, 477 U.S. 478, 493-496, 106 S.Ct. 2639, 2648-2650, 91 L.Ed.2d 397 (1986).

Teague v. Lane, __U.S.__, 109 S.Ct. 1060, 1073-1074 (1989).

The strange procedural history presented in the current case reveals the matter presented before the Court was only raised in the state post conviction relief proceedings. When presented with the issue, the state hearing judge concluded:

> In allegation VII, the Applicant contends that his confession was improperly introduced. This issue has been substantially disposed of in the ineffective assistance of counsel claim. As presented in this allegation, this Court lacks jurisdiction based upon the Supreme Court's mandate in Simmons v. State, supra. [264 S.C. 417, 215 S.E.2d 883 (1975)].

(J.A. p. 89). In Simmons v. State, supra, the Supreme Court of South

Carolina held that a post conviction relief proceeding is not a substitute for an appeal and particularly that "errors in a petitioner's trial which could have been reviewed on appeal may not be asserted or reasserted in post conviction proceedings. 264 S.C. at 423. The stated reliance on this case as depriving the state hearing court of jurisdiction is a "plain statement" finding of a state procedural default where the issue was not raised in the direct appeal.

Furthermore, he chose not to appeal to the State Supreme Court on the post conviction court's conclusion on the issue now being asserted before this Court. Similarly, this failure to appeal the state hearing court's conclusion of a procedural bar as to this issue should act as another bar to federal habeas relief. Whitley v. Bair,

802 F.2d 1487 (4th Cir. 1986); Mason v. Procunier, 748 F.2d 852 (4th Cir. 1984).

Here, the interests of comity would be best served by applying the state procedural bar. The petition for habeas corpus relief sets forth the ground for relief as follows:

> O. Denial of Fifth, Sixth and Fourteenth Amendments rights by failure to the trial judge to rule on the Petitioner's claims that the statement taken from him were the product of free and voluntary waiver.

(Joint Appendix to the Fourth Circuit, p. 1482). The State, in its Motion for Summary Judgment, merely stated that, based upon the record of the trial judge's findings, "his allegation was factually incorrect." (Joint Appendix to the Fourth Circuit, p. 1523). A similar understanding of the allegation in the Petition was found by the District Court. (J.A. pp. 96, 114). The problem presented herein is that the analysis of

the courts below, in obiter dicta, went beyond the allegation in the Petition that was actually before the Court.

It is irrelevant to the allegation presented in the Petition as to whether the State trial judge ruled on the voluntariness of the confession [Jackson v. Denno, 378 U.S. 368 (1964)] on the retroactivity of Arizona v. Roberson, supra. The State, in its Motion for Summary Judgment, stated state remedies had been exhausted to the claims raised in the Petition, which did not include the claims underlying the present matter. Compare Granberry v. Greer, 481 U.S. 129 (1987).

Here, the Petitioner failed to rely upon Edwards v. Arizona, 451 U.S. 477 (1981), in the direct appeal that was decided after the Edwards decision. Further, when the state post conviction

relief court found that there was a procedural bar to the present claim relying upon Simmons v. State, supra, he chose to not raise the issue in his appeal to the South Carolina Supreme Court from the post conviction denial. Further, the allegation is not even raised in the Petition for the Writ of Habeas Corpus filed on May 2, 1986, upon which the Motion for Summary Judgment was made.

This assertion of procedural bar has not been raised previously in these proceedings mainly because the allegation raised in the Petition varied significantly and is not the "same claim," Pitchess v. Davis, 421 U.S. 482 (1975), that is underlying the current presentation of the Petitioner, even though the Petition has never been amended. This Court has previously stated a prevailing party may "defend

its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeal." Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Accord Blum v. Bacon, 457 U.S. 132, 137 n. 5 (1982). We respectfully submit that for the reasons initially stated herein, the judgment of the Court of Appeals should be affirmed or in the alternative that certiorari should be dismissed as being improvidently granted.

II.

EDWARDS v. ARIZONA, 451 U.S. 477 (1981), IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM THE INSTANT CASE WHERE BUTLER NEVER REQUESTED COUNSEL'S ASSISTANCE DURING ANY INTERROGATION AND HIS RETAINED COUNSEL ON THE ASSAULT CHARGE MET WITH HIM PRIOR TO ANY QUESTIONING ON THE MURDER CASE.

The issue before this Court is not whether the Edwards v. Arizona, supra,

decision would apply to a case tried before the decision and appeal subsequently concluded in the State Supreme Court. The matter has been unequivocally resolved in Shea v. Louisiana, 470 U.S. 51 (1985). Similarly, the Court of Appeals recognized that fact in the decision in the case where it recognized that the Edwards decision does apply to cases pending on direct appeal at the time it was announced. (J.A. p. 129). It will be argued subsequently in the Brief that the later decision of this Court in Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), does not have retroactive application to cases pending on collateral review.

An alternative ground exists in the record that distinguished Edwards, supra, and also Roberson, supra, from the instant case. This Court has

recognized that a prevailing party may defend its judgment on any ground properly raised below. Washington v. Yakima Indian Nation, supra. We would submit for the reasons set forth herein that the judgment below should be affirmed.

The critical facts of the case more fully set out in the Statement can be summarized for pertinent purposes to this Argument. Butler was arrested on an unrelated assault charge and placed in custody in the Charleston County Jail. He was advised of his Miranda rights during questioning on that charge. He appeared at a bond hearing on August 31, 1980, where he was assisted by retained counsel o the assault charge. He was returned to jail after failing to make bond. That same night, he was transported from the jail to the police department where he was informed

by the police that he was to be charged in the murder of Pamela Lane. The officers went over the Miranda warnings orally and the Petitioner twice responded that he knew about the lawyer, but did not need a lawyer because he did not do the actual killing. (J.A. p. 7). The Petitioner then signed a written waiver of the same rights that he read out loud. (J.A. pp. 9-10). A statement was given admitting some involvement in the case. After further interrogation, another series of Miranda warnings were given orally and in writing. (J.A. pp. 15-16). Butler then gave a written statement admitting greater involvement in the murder. (J.A. pp. 16-17). Butler then voluntarily went with the officers to the crime scene. (J.A. p. 20). As the Court of Appeals found, at no time during the interrogation did Butler request the presence of an attorney.

In Edwards v. Arizona, supra, the Court held under the Fifth Amendment once an accused has invoked the right to have counsel present during a custodial interrogation, further interrogation must cease until counsel has been made available, unless the accused initiates further conversation with the police. 451 U.S. 477, 484-485. Central to the holding in Edwards was the fact that after the accused asserted his right to have counsel present during questioning, the police resumed the interrogation without giving Edwards access to an attorney. Under such circumstances, the Court concluded that additional safeguards were necessary before an accused may validly waive the right to counsel. Edwards, 451 U.S. at 484.

We submit that the Petitioner's analysis of Edwards is inapplicable to the present situation. First, he has

overlooked the significant difference between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. Second, Butler never invoked his right to remain silent or have counsel present during any questioning. Third, unlike Edwards, counsel was "made available" during the bond hearing.

A. The Relationship between the Fifth and Sixth Amendments.

In the argument in the Court of Appeals, the Petitioner relied heavily upon the reasoning of the Seventh Circuit in U.S. ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987). In Espinoza, the court, citing Michigan v. Jackson, 475 U.S. 625 (1986), held that individuals who invoke their right to counsel at an arraignment are deemed to have invoked both their Fifth and Sixth Amendment rights. Espinoza, 813

F.2d at 123. Respondents asserted below that Petitioner's reliance on Jackson, supra, is misplaced and would assert that this Court has not adopted that approach and should not do so.

In Michigan v. Jackson, supra, the Court held only that the Sixth Amendment right to the assistance of counsel guarantees that right at post-arraignment interrogations, because such interrogations represent "critical stages" of adversary judicial proceedings to which the Sixth Amendment applies. Jackson, 475 U.S. at 629-630. From this, the Court reasoned that a defendant's invocation of his Sixth Amendment right to counsel at post-arraignment interrogations is as much protected as is the Fifth Amendment right to counsel at a custodial interrogation. Jackson, 475 U.S. at 632.

The court in Jackson merely extended the rule of Edwards to Sixth Amendment invocations of the right to counsel; it did not hold that the invocation of a Sixth Amendment right to counsel at an arraignment also invokes a defendant's Fifth Amendment rights. Jackson, 475 at 636 n. 10. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court stated that the Fifth Amendment right to counsel attaches only to custodial interrogations. Accordingly, a bond hearing likewise does not implicate a defendant's Fifth Amendment right as it involves no compulsion of the accused to give evidence having a testimonial significance. See Kirby v. Illinois, 406 U.S. 682 (1972) (Fifth Amendment not implicated in a lineup).

A bond hearing has not been held to be a "critical" stage of the criminal

proceeding by this Court requiring the defendant the right to be represented by counsel nor is it an adversarial judicial proceeding. U.S. v. Gouveia, 467 U.S. 180 (1984).

Because no Fifth or Sixth Amendment right to counsel attached at the bond hearing, Butler's representation by retained counsel at that hearing on the assault charge must be viewed as only invoking a Sixth Amendment right to counsel on the assault charge. The significance of the distinction between the invocation of the Sixth Amendment as opposed to the Fifth Amendment is that the scope of the rights invoked differ. The Sixth Amendment right to counsel is limited to the specific crimes for which the state has begun prosecution (here, the assault charge); whereas Fifth Amendment rights, once invoked, extend to any subsequent interrogation.

Edwards, supra; Roberson, supra. Accord, Moran v. Burbine, 475 U.S. 412, 431 (1986); Maine v. Moulton, 474 U.S. 159, 180 n. 16 (1985). Here, the Sixth Amendment rights had not attached to the murder charge for no proceedings of any nature occurred concerning that charge at the bond hearing or questioning on that charge. Consequently, Butler's retention of counsel under the Sixth Amendment for the assault charge did not extend to the murder charge. Accordingly, Butler's multiple waivers of his Miranda rights as to the murder should not be rendered invalid under the Edwards rule, as no right to counsel under the Fifth Amendment had been previously invoked by the defendant to these charges to bring Edwards into play.

A. The Failure to Request Counsel at Any Interrogation.

Secondly, even if Butler is deemed to have invoked his Fifth Amendment right to counsel, he did not invoke it in the context of a custodial interrogation; therefore, the rationale of Edwards and also Roberson do not exist. In Roberson, the Court was concerned with the discomfort with the pressures of custodial interrogation continuing after counsel was requested to assist in the interrogation. Roberson, supra, 108 S.Ct. 2099. In contrast, the assistance of retained counsel without ever requesting such assistance during any interrogation before or after, tells us nothing about the defendant's belief as to his ability to deal with the pressures of custodial interrogation. Even if deemed invoked at the bond hearing, there would still not be a justification for extending the protection of that right to subsequent

police questioning of unrelated crimes. See U.S. v. Roberts, 869 F.2d 70 (2nd Cir. 1989); State v. Norris, 768 P.2d 296 (Kan. 1989).

Here, in light of the wholly voluntary and non-coercive circumstances surrounding the defendant's statements, there is no constitutional objective to be served by suppression. Accord Connecticut v. Barrett, 479 U.S. 523 (1987). The purpose of Miranda, "to insulate the exercise of Fifth Amendment rights from the government compulsion, subtle or otherwise" was not present. Id. at 527. Presence of retained counsel at a bond hearing does not raise a presumption that the defendant is unable to deal with custodial interrogations. The Petitioner never sought counsel's assistance during any interrogation when advised of his right

to so request. The judgment below could be affirmed for this reason.

C. Counsel was "made available" to Butler.

In Edwards, supra, the court held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S. 477, 484-485. Here, after the bond hearing where retained counsel on the assault charge was present, and we submit met with counsel, the Petitioner after successive Miranda warnings orally waived the assistance of any counsel and proceeded to give a statement. Unlike Edwards, Roberson, or Michigan v. Jackson, supra, in which

counsel was requested but not seen, the Petitioner here had counsel with him during the bond hearing. Simply put, counsel was "made available." Edwards emphasized the necessity of making counsel "available" or of the defendant having "access" to counsel, Edwards, supra, 451 U.S. 484-487, rather than holding that once the accused requests counsel he may thereafter be questioned only in the presence of counsel. See U.S. v. Missler, 414 F.2d 1293 (4th Cir. 1969) (after indictment on a different charge, defendant's incriminating statements made out of counsel's presence did not preclude admission of statement in prosecution for new crime committed after the earlier indictment). In U.S. v. Halliday, 658 F.2d 1103 (6th Cir. 1981), the court held the Fifth Amendment was not violated when counsel was "made available" after a request for

counsel under Edwards. Also, the United States Supreme Court in Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam), the Court limited Edwards to the extent that its language was interpreted to not require the "presence" of counsel at an interrogation after he had met with counsel. Cf. Roper v. State, 375 S.E.2d 600 (Ga. 1989). Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988).

Similarly,in Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987), the Court rejected a Fifth Amendment challenge where a defendant advised the trial court at an arraignment that he had a lawyer and desired him to appear at a preliminary hearing on a larceny charge, but never sought to have him present during any interrogation on the other charges. The Sixth Circuit relied upon Connecticut v. Barratt, 479 U.S. 523 (1987). In Barratt, where a defendant

stated he was willing to give an oral statement but would not give a written statement unless his attorney was present, it held he invoked his right to counsel for purposes of the interrogation. In Boles, however, the Court found that he did not invoke his right to have counsel present during an interrogation where his statement at the arraignment was that he wished to have his attorney present at the preliminary hearing.

Further, the lower courts have held where the accused had a "reasonable opportunity" to consult with counsel, such as a break in custody after the request was made. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); U.S. v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982); State v. Norris, 768 P.2d 296 (Kan. 1989); State v. Fetterly, 766 P.2d 701 (Idaho 1988). In Fetterly, the

state court held that counsel was appointed and the defendant had benefit of him while released on bail. The court reasoned that when he was later arrested for murder, he was familiar with his rights and aware counsel could be appointed on the new charge and "in no way disabled or coerced into waiving his rights." 766 P.2d at 704 n. 2.

In Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), it was held that a suspect's request to speak to a particular attorney was not an invocation of a general right to counsel where the police honored the request and resumed the interrogation only after he had spoken with the attorney. It is important in Griffin that the police sought to assure that his request had been fully honored by inquiring whether he wished to talk to any other attorney. He stated he did not wish to speak to

another attorney at that time and questioning resumed and Miranda rights waived. In that situation as here: there is no constitutional objective that could be served by suppression. Accord Connecticut v. Barratt, supra.

Similarly, in Commonwealth v. Santiago, 545 A.2d 316 (Pa. Super. 1988), the state court found Edwards not to be controlling in a situation where the accused exercised his rights and counsel was immediately made available to him. Importantly, however, the police officers did not seek to interview the defendant until after he had consulted with an attorney. 545 A.2d at 320.

In each of the above cases, the concerns of the Fifth Amendment right to have counsel's assistance during a custodial interrogation were satisfied when counsel was made available or

circumstances occurred such as a break in custody with appointment of counsel that created a "reasonable opportunity" to consult with counsel. As previously stated in the earlier arguments, the concerns of coercion or discomfort that Edwards suggests are not present under these facts. Here, counsel met and talked with Butler at the bond hearing. When contacted about the new charge he stated he did not want any lawyer on numerous occasions and never asked to see his retained counsel or to see appointed counsel during the interrogation. Simply put, the record is clear that counsel was "made available" for the purpose he desired, the bond hearing on the unrelated assault charge, and the Petitioner did not desire to involve him during the interrogation when given the

opportunity. Edwards was satisfied by these facts.

In summary, Arizona v. Roberson should not affect this case because Horace Butler never invoked his Fifth Amendment right by requesting counsel to assist in any interrogation. Counsel merely appeared with his client at an unrelated bond hearing and consulted, although the information exchanged during the consultation has varied in the various proceedings. Since no Sixth Amendment right had attached on the murder charges and the Petitioner never sought to have counsel "made available" after his consultation after the bond hearing, we submit that the mandate of Roberson and Edwards has not been violated. Therefore, we submit that the Writ of Habeas Corpus was properly dismissed and denied because the Petitioner's constitutional rights were

not infringed and certiorari should be denied.

III.

ASSUMING THAT ROBERSON FACTUALLY APPLIES TO THE SITUATION, THE FOURTH CIRCUIT CORRECTLY STATED IN ITS ORDER, SUA SPONTE, THAT IT DOES NOT HAVE RETROACTIVE APPLICATION.

In its Order of December 3, 1988, denying the Petition for Rehearing and Suggestion for Rehearing En Banc, Judge Hall stated that "we are fully satisfied that Butler may not claim any retroactive benefit from Roberson." The Order concluded that the interrogation was conducted in strict accordance with established law in 1980, and that there was no support that there was an "actual violation of his constitutional rights in 1980." (J.A. p. 136). As the Order stated:

> It is undisputed that local authorities provided full Miranda warnings before questioning Butler on the Lane murder.

> It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that the appellant freely waived any fifth amendment protections in 1980.

(J.A. p. 136). The Order of the Fourth Circuit reflects its sua sponte determination that the decision in Arizona v. Roberson, supra, established new guidelines for law enforcement and did not have more than the most tangential relationship to truth finding.

This Court has recently looked at retroactivity in its decision in Teague v. Lane, __U.S.__, 109 S.Ct. 1060 (1989). Justice O'Connor wrote that in habeas corpus the issue of retroactivity should be a threshold question "for,

once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all those similarly situated." Id. at 1069-1070. In her opinion, a new rule for retroactivity purposes is when it breaks new ground or imposes a new obligation on state or federal Government. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. at 1070, citing Truesdale v. Aiken, 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting).

In the habeas corpus context, Justice O'Connor's analysis adopted Justice Harlan's view of retroactivity set forth in Mackey v. U.S., 401 U.S. 667, 675 (1971), for cases on collateral review. Particularly, the opinion

recognized the frustration of state courts to faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands. In Teague, two exceptions to the general rule on nonretroactivity were stated:

> (1) a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe;" and
>
> (2) a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty."

In Penry v. Lynaugh, __U.S.__, No. 87-6177 (June 26, 1989), the court relied upon the Teague analysis and concluded that the finality concerns underlying Justice Harlan's approach are applicable in the capital sentencing context, as are the two exceptions to

his general rule or nonretroactivity set out above.

As indicated in both Teague and Penry, the Court must initially determine whether granting him the relief he seeks would create a "new rule." The suggestion here is better put whether this Court's decision in Arizona v. Roberson, supra, created a "new rule."

On the issue of whether a matter would be a "new rule," the Court stated:

> Justice Harlan recognized the inevitable difficulties that will arise in attempting to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. Mackey, supra, at 695. [Citations omitted].

Penry, supra. Application of constitutional rules not in existence at the time a conviction became final

seriously undermines the principle of finality which is essential to the operation of the criminal justice system. The Court in Teague, supra, 109 S.Ct. 1075, further recognized that "state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover during a habeas proceeding new constitutional commands."

In U.S. v. Johnson, 457 U.S. 537, 549 (1982), the Court stated:

> When a decision of this Court merely has applied settled precedents to new and different factual situations, no real questions of retroactivity has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Similarly, in Yates v. Aiken, 484 U.S. 211 (1988), the Court held that the rule of Francis v. Franklin, 471 U.S. 307

(1985), did not announce a new rule because it "was merely an application of the principle that governed our decision in Sandstrom v. Montana, 442 U.S. 510 (1979), which had been decided before the defendant's trial took place."

The question raised in this proceeding is whether the rule of Arizona v. Roberson, supra, is a new rule or is it merely an application of the principle that governed this Court's decision in Edwards v. Arizona, supra. Stated another way, did Roberson announce a new rule that was not dictated by precedent existing at the time of the conviction. The Petitioner contends that Roberson was not a new rule but merely applied Edwards.

In Edwards, the defendant was arrested on various charges including murder. He submitted to interrogation initially but then requested an

attorney. Questioning ceased, but two detectives came to the jail the next morning and a guard advised them to talk with Edwards. He waived his right to silence and implicated himself. The Court reversed holding that an accused who expresses his desire to face further questioning with counsel present will not be subject to further interrogation until counsel is made available unless he initiates it. The Court therein was concerned with the accused's understanding of his rights and his willingness to waive them free of coercion.

The focus of Edwards was to protect an accused in custody from being badgered into confessing to the crime he had been interrogated upon. Subsequent questioning about a different and independent investigation presents

little risk of the same concept of police badgering.

Far different from the focus of Edwards, the rule announced in Arizona v. Roberson, supra, focused on two separate investigations. The only similarity was continuous custody and that counsel had not been made available. As the dissent reasoned in Roberson,

> It is a frequent occurrence that the suspect is wanted for questioning for other crimes unrelated to the one for which he has been apprehended. The rule announced today will bar law enforcement officials, even those from some other city or other jurisdiction from questioning a suspect about an unrelated matter if he is in custody and has requested counsel to assist in answering the questions put to him about the crime for which he was arrested.

Roberson, supra, 108 S.Ct. 2102 (Kennedy, J., dissenting).

The Roberson decision was the first to apply the bright line rule to

separate investigation. To the contrary, in Maine v. Moulton, supra, the court was careful to note under a Sixth Amendment analysis that while evidence that related to invoked charge would not be admissible, the evidence pertaining to the charges to which the Sixth Amendment right had not attached would be admissible. Accord Michigan v. Moseley, 423 U.S. 96 (1975). While admittedly not controlling in the context presented, these cases indicate a clear difference concerning separate investigations. An analysis of those cases clearly reveals the result in Roberson was not dictated by Edwards. The analysis instead reveals that it should more properly be styled an extension of Edwards to separate investigations.

Here, the Order below determined that the rule of Arizona v. Roberson

announced a new rule by setting new guidelines for law enforcement officers by requiring the preclusion of any interrogation on unrelated conduct after a suspect in custody had invoked his right to counsel on the subject of his custody. (J.A. p. 136). The Supreme Court had never addressed that setting although some other state courts had held that it was not a constitutional violation. State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); Lofton v. State, 471 S.E.2d 1294 (Fla. App. 1985); State v. Newton, 682 P.2d 295 (Utah 1984). Roberson, supra, 108 S.Ct. 2093, 2097, n. 3. As Roberson acknowledged, the statements deemed inadmissible in Edwards and later cases applying its doctrine were statements relating to the same investigation in which the right to counsel was invoked.

Roberson, supra, at 2102. Here, the new rule of Roberson was the first opinion to apply it to separate investigations which is as much a new rule of criminal procedure as the Edwards decision was when it was decided. Solem v. Stumes, 465 U.S. 638 (1984).

The Petitioner contends that the lower court did not apply Edwards retroactively. We disagree. As stated in the panel decision, the Fourth Circuit unequivocally applied Edwards to the Butler situation. (J.A. p. 129). The Court, in reconsideration of the Petition for Rehearing, stated that it would not apply the mandate of this Court's decision in Roberson to the Butler setting. (J.A. pp. 134-137).

Since Roberson established new guidelines for law enforcement, we submit that it should not be applied to collateral review since it does not fall

within the two exceptions set forth in Justice O'Connor's opinion in Teague. Application of the rule in Roberson would not accord constitutional protection to any primary, private individual conduct nor create the watershed rule of criminal procedure Mackey, supra, was concerned with. Here, the suspect received oral warnings pursuant to Miranda and signed two written waivers of his constitutional rights, including his right to have counsel appointed or assist in the interrogation. In this record, at no time did he ever request counsel to assist the interrogation for this crime or the unrelated crime he was in custody for before or during the interrogation. Simply put, this case does not present the concerns of "badgering" or coerciveness that Roberson was concerned with remedying. Now, almost nine years

after the interrogations, the Petitioner seeks to have a technical change applied to him where the evidence is undisputed that he waived his right to have the assistance of counsel.

CONCLUSION

For all of the foregoing reasons, we submit that the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed or certiorari dismissed. Should the Court find that Roberson should be retroactively applied, remand on the merits of the Roberson claim to the Court of Appeals may also be appropriate.

Respectfully submitted,
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ATTORNEYS FOR RESPONDENTS
By: Donald J. Zelenka

* Counsel of Record
August 11, 1989

IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6677
October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief of Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to John H. Blume, Esquire, South Carolina Death Penalty Resource Center, Post Office Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 11th day of August, 1989.

Donald J. Zelenka

SWORN to before me this

11th day of August, 1989.

Melvin Gergel (LS)
Notary Public for South Carolina
My Commission Expires: July 1993.

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AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief of Respondents in the above captioned case by depositing same with Emery & Purolator Worldwide Courier & Cargo, prepaid, and properly addressed to the Clerk of this Court.

This 11th day of August, 1989.

Donald J. Zelenka

SWORN to before me this
11th day of August, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: July 19, 93